In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 423

PAUL F. BRUNING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The issue involved in the present case is whether the United States is entitled to recover post-bankruptcy interest on its tax claims out of property acquired by the bankrupt after discharge from bankruptcy, where the tax claims were not discharged by reason of Section 17 of the Bankruptcy Act.

The taxpayer was adjudicated a bankrupt on July 6, 1953. At that time the United States had assessed unpaid withholding and F.I.C.A. taxes for 1951. The trustee made a partial payment of the principal of

the taxes out of the assets in the bankrupt estate, and the taxpayer was granted a discharge from bankruptcy on October 29, 1953. Subsequently, in 1957, the taxpayer filed claims for a refund of income taxes paid for the years 1953 and 1954, which resulted in his being allowed a credit for income taxes and interest in respect of those years. On March 7, 1958, the Director of Internal Revenue applied the entire 1953 credit and part of the 1954 credit to the balance of the assessment of the withholding and F.I.C.A. taxes owed for 1951 plus interest to date—including the interest which had accrued during the period between the filing of the petition in bankruptcy on July 6, 1953, and the date of credit, March 7, 1958. The amount of this latter interest, $759.40, is the subject of the present controversy. The taxpayer did not question the Director's right to setoff from the amount of refund due him the unpaid principal of the taxes and the pre-bankruptcy interest. However, he brought the present suit for refund of the post-petition interest. (Pet. App. 2-3.)

Section 17(a) of the Bankruptcy Act, c. 541, 30 Stat. 544 (11 U.S.C. 35 (a)), as amended, specifically excepts from discharge in bankruptcy those "provable debts" which "are due as a tax levied by the United States."[1] No provision of the Bank-

[1] Section 17(a), so far as here pertinent, reads as follows:

> A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are due as a tax levied by the United States, or any State, county, district, or municipality * * *.

ruptcy Act provides that the debtor shall be released from liability for future interest on debts which have not themselves been discharged, and we believe there is no basis in reason for such a partial discharge of a debt which the statute excepts from discharge. Moreover, Section 1420 and 1627 [2] of the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed., Secs. 1420 and 1627), which impose interest upon delinquent withholding and F.I.C.A. taxes, provide that such interest "shall be added as part of the tax." Both courts below construed these provisions as entitling the government to collect post-bankruptcy interest on delinquent taxes out of assets which were acquired by the taxpayer subsequent to his discharge in bankruptcy.

As the court below indicated (Pet. App. 10), the decision in the present case conflicts with that of the Tenth Circuit in *United States v. Mighell*, 273 F. 2d 682.[3] We believe that the court below was correct

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[2] Section 1627 was added to the Internal Revenue Code of 1939 by Section 2(a) of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, and incorporates by reference Section 1420.

[3] See also, *Sword Line* v. *Industrial Commissioner of State of N.Y.*, 212 F. 2d 865 (C.A. 2), certiorari denied, 348 U.S. 830, and *National Foundry Co. of N. Y.* v. *Director of Int. Rev.*, 229 F. 2d 149 (C.A. 2). The taxpayer is mistaken in asserting a conflict (Pet. 4, 5-6) between the decision below and *New York* v. *Saper*, 336 U.S. 328. In *Saper* this Court held that post-bankruptcy interest is not collectible where the assets from which the interest would have been paid were part of the bankrupt estate. As both courts below point out (Pet. App. 3-7, 12), the present case is different, in that here the government seeks to collect interest only from assets

and the Tenth Circuit was wrong in *Mighell*. There is a direct conflict, however; the question is one of continuing importance in the administration of the revenue and bankruptcy laws; and this case is an appropriate one for its resolution. Consequently, we do not oppose the issuance of a writ of certiorari.

Respectfully submitted,

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which never formed a part of the bankrupt estate, but were acquired by the taxpayer after his discharge from bankruptcy. Accordingly, the considerations expressed by this Court in *Saper*, which led it to deny post-bankruptcy interest payable out of the bankrupt estate, are not applicable to the debts involved in the present proceeding.

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